

**\*\* E-filed March 24, 2010 \*\***

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

MULTIVEN, INC., a Delaware corporation,  
Plaintiff,  
v.  
CISCO SYSTEMS, INC., a California  
corporation,  
Defendant.

No. C08-05391 JW (HRL)  
**ORDER DENYING CISCO’S MOTION  
FOR SANCTIONS**  
**[Re: Docket No. 137]**

AND RELATED COUNTERCLAIMS

Plaintiff Multiven, Inc. (“Multiven”), a provider of service and maintenance support for router and networking systems, sued defendant Cisco Systems, Inc. (“Cisco”), a leading provider of Internet Protocol-based networking technologies, alleging violations of the Sherman Antitrust Act and related state claims. Cisco then countersued Multiven as well as Pingsta, Inc. (“Pingsta”) and Peter Alfred-Adekeye, a former Cisco employee and current Chief Executive Officer of Multiven and Pingsta.<sup>1</sup> Cisco’s counterclaims allege copyright infringement, violation of the Computer Fraud and Abuse Act, false advertising in violation of the Lanham Act, and related state claims.

Cisco now moves for sanctions against Multiven’s counsel under 28 U.S.C. § 1927 and the court’s inherent powers based on Multiven’s motion to disqualify Cisco’s counsel, Winston & ///

<sup>1</sup> In this motion, the court will refer to all three counterdefendants as “Multiven.”

1 Strawn LLP. Multiven opposes the motion. Pursuant to Civil Local Rule 7-1(b), the court finds the  
2 matter suitable for determination without oral argument, and the March 30, 2010 hearing is vacated.

### 3 **LEGAL STANDARD**

4 A court has the discretion to award sanctions where an attorney “so multiplies the  
5 proceedings in any case unreasonably and vexatiously.” 28 U.S.C. § 1927. The court also has the  
6 inherent power to award sanctions to vindicate judicial authority. *Chambers v. NASCO, Inc.*, 501  
7 U.S. 32, 45, 49 (1991); *Mark Indus., Ltd. v. Sea Captain’s Choice, Inc.*, 50 F.3d 730 (9th Cir. 1995).  
8 Yet sanctions under either theory require a finding of bad faith. *Chambers*, 501 U.S. at 45; *In re*  
9 *Keegan Mgmt Co., Sec. Litig.*, 78 F.3d 431, 436 (9th Cir. 1996). Mere recklessness, in the absence  
10 of something more suggesting bad faith, will not justify sanctions. *In re Keegan*, 78 F.3d at 436;  
11 *Fink v. Gomez*, 239 F.3d 989, 993–94 (9th Cir. 2001). Simply put, the bad-faith requirement is a  
12 high threshold. *Mendez v. County of San Bernadino*, 540 F.2d 1109, 1132 (9th Cir. 2008).

### 13 **DISCUSSION**

14 On December 1, 2009, Cisco filed an ex parte motion seeking a temporary restraining order  
15 to preserve evidence in this case. (Docket No. 62.) Judge Seeborg denied Cisco’s motion that same  
16 day, and ordered Cisco to file electronically the documents relating to the motion. (Docket No. 61.)  
17 Cisco did so on December 8. One of the documents Cisco used in support of its motion was a  
18 declaration of James Light, Multiven’s former Vice President of Sales. (Docket No. 64.)

19 On January 21, 2010, Multiven moved to disqualify Cisco’s counsel on grounds that it had  
20 improperly made ex parte contact with Light to obtain privileged information. (Docket No. 89.) On  
21 February 4, Cisco moved to transfer that motion to this court. (Docket No. 121.) Judge Ware  
22 granted Cisco’s request on February 9 (Docket No. 127), and Multiven re-noticed the motion before  
23 this court on February 11 (Docket No. 130). This court then issued an order on an unrelated  
24 discovery motion concerning Light on February 16 (Docket No. 133); three days later, Cisco filed  
25 the instant motion for sanctions. On February 23, Multiven withdrew its motion to disqualify  
26 Cisco’s counsel. (Docket No. 139.)

27 Cisco moves for sanctions against Multiven on grounds that Multiven’s disqualification  
28 motion lacked both legal and evidentiary support. As a result, it asserts that Multiven’s motion was

1 nothing more than an attempt to harass Cisco, delay the case, and needlessly multiply the  
2 proceedings. It argues that Multiven's counsel's decision to file the motion—and in particular, to  
3 re-notice it after Cisco says it told Multiven of what it saw as fatal weaknesses in the motion—was  
4 reckless conduct that amounted to bad faith.

5 Multiven counters that it did not bring or maintain its motion for any improper purpose. It  
6 says that after it learned of Light's contacts with Cisco's counsel following Cisco's unsuccessful  
7 motion for a temporary restraining order, it became concerned that Light had divulged privileged  
8 information about the instant litigation. It claims that documents Cisco's counsel sent to it in  
9 January confirmed its suspicions. It says that its motion was supported by evidence (for some of  
10 which it sought *in camera* review) and included a good-faith legal argument in support of its  
11 position. It asserts that it chose to withdraw the motion after later events, including an order from  
12 this court, caused its counsel to re-evaluate its position.

13 The court is unpersuaded that Multiven's counsel filed the motion in bad faith. It is possible  
14 that Multiven's arguments in support of its motion may not have convinced the court that  
15 disqualification was appropriate. Indeed, Cisco's instant motion for sanctions provides numerous  
16 arguments in opposition to Multiven's case for disqualification—arguments that very well may have  
17 carried the day had Multiven's motion been submitted to the court. Yet Cisco's arguments and the  
18 court's review of Multiven's motion do not support that the motion was so clearly deficient that  
19 Multiven's counsel's decision to file it was reckless and only meant to harass or delay.

20 The court is also unpersuaded that Multiven re-noticed the disqualification motion in bad  
21 faith. Cisco argues that Multiven's counsel should have withdrawn the motion after Cisco filed a  
22 second declaration from Light where he asserted that he had not disclosed privileged information.<sup>2</sup>  
23 Multiven asserts that its re-notice was not nefarious, but rather that it simply was following Judge  
24 Ware's referral order. Certainly, Cisco should have expected that Multiven would likely re-notice  
25 the motion on account of Cisco's request to move the motion to this court. It also is unsurprising  
26 that Multiven's counsel may have discounted Light's latest salvo in the dispute. Of course,

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27  
28 <sup>2</sup> Cisco filed Light's second declaration, without authorization, shortly after Judge Ware referred the  
disqualification motion to this court, and did so unconnected to any pleading or within the briefing  
schedule for the disqualification motion. (Docket No. 128.)

1 Multiven was under no legal obligation to change its motion before re-noticing it simply because  
2 Cisco demanded it, and its failure to do so does not indicate bad-faith conduct.

3 Finally, Cisco has not convinced the court that Multiven's withdrawal of its disqualification  
4 motion means that Multiven's counsel must have known that the motion lacked evidentiary and  
5 legal support. Multiven's decision to withdraw the motion after its counsel re-evaluated its position  
6 in light of later events—such as Light's second declaration, Cisco's Rule 11 threat, and Multiven's  
7 counsel's view that this court would not be receptive to its motion—seems plausible under the  
8 circumstances. The court does not find that Multiven's tactical decision to withdraw the motion at  
9 that point suggests that its counsel acted in bad faith all along.

10 Basically, Cisco argues that Multiven's motion to disqualify Cisco's counsel was absolutely,  
11 positively, specious—unsupportable on any basis—and that this court would surely have denied it.  
12 Cisco presumes too much. This court never had to rule on the disqualification motion, since it was  
13 withdrawn. Having never considered the motion, this court is not now prepared to say what it *would*  
14 have done with it. What it can say now is that it is unpersuaded by Cisco's presumption.

### 15 CONCLUSION

16 Courts have declined to find bad faith even in situations where the conduct at issue was  
17 “totally frivolous,” “outrageous,” “inexcusable,” and “appalling.” *Mendez v. County of San*  
18 *Bernadino*, 540 F.2d 1109, 1132 (9th Cir. 2008) (citing *Primus Auto. Fin. Servs., Inc. v. Batarse*,  
19 115 F.3d 644, 649 (9th Cir. 1997)). Although Cisco argues that Multiven's conduct has been all of  
20 these things, under the circumstances presented in this case, the court finds that Multiven's pursuit  
21 of its disqualification motion did not rise to the level of bad faith. Accordingly, Cisco's request for  
22 sanctions is DENIED.

23 **IT IS SO ORDERED.**

24 Dated: March 24, 2010

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27 HOWARD R. LOYD  
28 UNITED STATES MAGISTRATE JUDGE

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